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CASE NO. 83-2050

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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PACIFIC POWER & LIGHT COMPANY
PETITIONER,

V.

PUBLIC SERVICE COMMISSION OF WYOMING,
RESPONDENT.

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ON WRIT OF CERTIORARI TO THE WYOMING
SUPREME COURT

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# REPLY BRIEF

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## QUESTIONS PRESENTED

1. Is state regulation of utilities subject to constitutional limitations?

2. Have previous decisions of this Court rendered Petitioner's federal question insubstantial?

3. Are there independent and adequate state grounds in support of the Wyoming Supreme Court judgment?

4. Has Petitioner properly preserved and presented a federal question?

## PARTIES

On June 15, 1984, after the Petition For Writ Of Certiorari was filed, Petitioner, Pacific Power & Light Company, changed its corporate name to PacifiCorp. For the purpose of its Wyoming electric operations, PacifiCorp does business under the assumed business name Pacific Power & Light Company. In addition, after the Petition For Writ Of

Certiorari was filed, Petitioner obtained an ownership interest in several additional subsidiaries.[1]

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[1] Petitioner PacifiCorp is a Maine corporation and owns portions of the following subsidiaries and affiliates: Northwest Energy Sevices Co., NORNEV Demonstration Geothermal Co. and Pacific Northwest Power Co.

In addition Petitioner has two wholly owned subsidiaries, Pacific Telecom, Inc. and NERCO, Inc., which in turn own portions of the following subsidiaries and affiliates:

Pacific Telecom, Inc.

Associated P&C Engineers, Inc.; AT&E Corp.; Cid Communiciones, Limitada; Comdial Corp.; Constant Communications Company; Evotek; Exo Systems Corporation; Eyedentify, Inc.; Flight Dynamics, Inc.; Interior Telephone Co.; MicroRIM, Inc.; Multivisions, Inc.; NorCom Construction, Inc.; Pacific TelCom Construction Co.; Proactive Systems, Inc.; Ron Morris Corporation; Sertel, Inc.; STU Partnership; and Telcom Construction Co.

NERCO, Inc.

ACT Group; AKRG Joint Venture; Alligator Ridge Joint Venture; Bald Mountain Join Venture; Bridger Coal Company; Clements Energy Associates; Clements Energy 1979-I; Clements Energy

(Footnote continued)

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(Footnote 1 continued from previous page) 1979-II; Clements Energy 1980; Clements Energy 1981; Clements Energy 1982-I; Clements Energy 1982-II; Decker Coal Company; Ketchum Creek Joint Venture; Montana Royalty Company, Ltd.; Rampart Joint Venture; Royal Mountain King Joint Venture; Ruby Joint Venture; Taylor Joint Venture; Teton Nuclear Exploration; Unga Joint Venture; and Victor Joint Venture.

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Cleveland Electric Illuminating Co. v. Office of Consumer's Counsel, 4 Ohio St. 3d 107, 447 N.E.2d 746 (1983), App. dismissed for want of substantial federal question, ____ U.S. ____, 104 S.Ct. 47, 78 L.Ed.2d 68 (1983) 4-5

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West Ohio Gas Co. v. Public Utilities Comm'n, 294 U.S. 63, 78, 55 S.Ct. 316, 79 L.Ed. 761 (1935) 3

## STATE REGULATION OF UTILITIES IS SUBJECT TO FEDERAL CONSTITUTIONAL LIMITATIONS

Although Respondent agrees that a regulatory commission is charged with reaching a balance between consumers and producers of utility service, it does not discuss whether Respondent's opinion and the Wyoming Supreme Court decision analyzed the balance of these interests, as previously required by this Court.

Petitioner agrees that Wyoming has a legitimate and substantial interest in protecting utility customers. However, a state cannot, under the guise of protecting customers, fail to consider the legitimate interests of utility investors. For example, a state could "protect" customers, by requiring that a utility provide service at no charge. Such conduct would not consider the interests of investors and would confiscate their property without just

compensation or due process of law. Although the above example is an extreme situation, it makes clear that this Court should not defer to all decisions of state regulatory commissions and state court review of such decisions.

This Court has reviewed and overturned state court decisions when the utility demonstrated the commission had failed fairly to balance the interests of consumers and investors and that such result had produced confiscation. Respondent's decision and the Wyoming Supreme Court opinion made no effort to balance the competing interests. In addition, the uncontradicted evidence presented to Respondent established that Respondent's denial of compensation reduced Petitioner's return on its total investment to 2.5 percent and provided no return on its common equity. (Tr. 883-84.) This action is clearly confiscatory

in view of the previous decisions of this Court. For example, in West Ohio Gas Co. v. Public Utilities Comm'n, 294 U.S. 63, 78, 55 S.Ct. 316, 79 L.Ed. 761 (1935), and in Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of West Virginia, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923), this Court found that returns of 4.28 percent and 6 percent, respectively, were too low to satisfy constitutional requirements.

This Court should exercise its authority to consider whether the above result of the state regulation violates Petitioner's constitutional rights.

## PREVIOUS DECISIONS OF THIS COURT HAVE NOT RENDERED PETITIONER'S FEDERAL QUESTION INSUBSTANTIAL

Respondent contends Petitioner's federal question is insubstantial because (1) it has no right to have property included in its rate base which is not "used and useful"; and

(2) disallowance of cancelled plant costs as an operating expense does not constitute confiscation of private property. The decisions cited do not support Respondent's contention.

Decisions of this Court establish the limited proposition that a utility may not receive a return on property that is not used. Petitioner does not request that it be allowed a return on the investment in the abandoned facilities. Rather, Petitioner contends that unless it receives an opportunity to recover these expenditures, the allowed and actually achieved return on its facilities that are used and useful will be reduced to a confiscatory level.

Respondent states that the Ohio Court twice found that disallowance of cancelled plant costs did not constitute confiscation. The Ohio cases are distinguishable. In Cleveland Electric

Illuminating Co. v. Office of Consumer's Counsel, 4 Ohio St. 3d 107, 447 N.E.2d 746 (1983), App. dismissed for want of substantial federal question, ____ U.S. ____, 104 S.Ct. 47, 78 L.Ed.2d 68 (1983), the Ohio Supreme Court found that to establish confiscation, under the Constitution, the utility must demonstrate that the rate order falls outside the broad zone of reasonableness, but had failed to do so. (447 N.E.2d at 748.) Similarly, in Dayton Power & Light Co. v. Public Utilities Comm'n, 4 Ohio St. 3d 90, 447 N.E.2d 733 (1983), the Ohio Supreme Court found that although a utility may theoretically be able to establish confiscation in violation of the Constitution, the utility had failed to show that the Commission's order, viewed in its entirety, produced an unjust, unreasonable, and, therefore, confiscatory result. (447 N.E.2d at 744-45.)

Petitioner here has shown that Respondent's order clearly produces an unjust, unreasonable and confiscatory result. In sum, Petitioner has presented a substantial federal question for review by this Court.

## THERE ARE NO INDEPENDENT AND ADEQUATE STATE GROUNDS SUPPORTING THE WYOMING SUPREME COURT JUDGMENT

Respondent's discussion of the basis of the Wyoming Supreme Court's decision is confused, if not misleading. Respondent first states the decision below is not based on Petitioner's failure to seek prior approval from the Respondent. Respondent then asserts the Wyoming statutes as to used and useful property and operating expenses formed the basis of the Wyoming Supreme Court decision. This statement is contradicted by Respondent's later statement that because Petitioner had not sought prior approval of the expenditures, Respondent

had no authority to consider such expenditures. In either event, the end result of the Wyoming Supreme Court's application of state law is confiscation of Petitioner's property.

Petitioner does not seek to have this Court review construction of Wyoming law by the Wyoming Supreme Court. Petitioner does, however, seek to have this Court determine if the application of Wyoming law to Petitioner results in confiscation of Petitioner's property. Respondent correctly asserts that the majority opinion of the Wyoming Supreme Court places no reliance on federal law. To the contrary, despite Petitioner's clearly presented claims that the result imposed by the Respondent on the basis of the Wyoming statutes violated Petitioner's constitutional rights, the

Wyoming Supreme Court ignored such claims. Finally, the procedural prerequisite of seeking prior approval created by three of the five Wyoming Supreme Court justices cannot reasonably be applied retroactively to deprive Petitioner of its constitutional rights.

## PETITIONER PROPERLY PRESENTED A FEDERAL QUESTION

The petition establishes that a federal question was clearly and repeatedly presented to both Respondent and the Wyoming Supreme Court. Despite the clear and consistent presentation of a federal question by Petitioner, neither the Court nor Respondent acknowledged or discussed these important claims. Despite this history, which Respondent ignores, Respondent contends that the Petition should be dismissed because Petitioner's rehearing application did not reassert the federal question. To the contrary,

Petitioner's rehearing application specifically advised the Wyoming Supreme Court that it was not waiving any arguments that it previously presented for the Court's consideration. These arguments clearly included Petitioner's federal question claims. Respondent and the Wyoming Supreme Court were at all times aware of Petitioner's federal question claims. Requiring that such claims be restated would have served no useful purpose.

## CONCLUSION

Petitioner respectfully requests that the Court grant its Petition For Writ Of Certiorari.

Respectfully submitted,

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